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In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, when a district court has held an Act of Congress unconstitutional in a case to which an officer of the United States is a party, an appeal challenging the relief ordered by the district court must be taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, even though the appellant does not seek review of the district court's constitutional holding.

PARTIES TO THE PROCEEDING

Respondents are members of a class defined by the district court as follows (App. C, *infra*, 4a):

> All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411(a)(5)(A).

By subsequent order, the district court confined the class to those persons who received a final decision by the Secretary denying or reducing benefits on this basis after August 20, 1980 (App. E, *infra*, 14a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	21
Appendix A	1a
Appendix B	2a
Appendix C	3a
Appendix D	5a
Appendix E	13a
Appendix F	16a
Appendix G	17a

TABLE OF AUTHORITIES

Cases:

Becker v. *Harris*, 493 F. Supp. 991 .... 3, 4, 6, 19

Califano v. *Goldfarb*, 430 U.S. 199 3

Califano v. *Westcott*, 443 U.S. 76 3

Carrasco v. *Secretary of HEW*, 628 F.2d 624 ..... 3, 4, 5, 19

Chevron Oil Co. v. *Huson*, 404 U.S. 97 6

Consumer Energy Council of America v. *FERC*, 672 F.2d 425 13

Donovan v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 ..... 7, 8, 9, 17, 18, 19, 20

Fleming v. *Rhodes*, 331 U.S. 100 18

Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 20

Hester v. *Harris*, 631 F.2d 53 ..... 3, 4, 19

Cases (Cont'd): Page

McLucas v. *DeChamplain*, 421 U.S. 21 ..... 13, 17, 18
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 81–150. (June 28, 1982) 6
Phillips v. *United States*, 312 U.S. 246 20
Query v. *United States*, 316 U.S. 486 ..... 5, 20
Rasmussen v. *Gardner*, 374 F.2d 589 5
Reid v. *Covert*, 351 U.S. 487, vacated on other grounds, 354 U.S. 1 18
United States v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561 20
Williams v. *Zbaraz*, 448 U.S. 358 ..... 13, 16

Statutes:

Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 *et seq.* 10
Section 2, 26 Stat. 826 10
Section 5, 26 Stat. 827 11
Section 6, 26 Stat. 828 10
Act of Mar. 3, 1911, ch. 231, Section 238, 36 Stat. 1157 11
Act of Feb. 13, 1925, ch. 229, Section 238, 43 Stat. 938 11
Act of Aug. 24, 1937, ch. 754, Section 2, 50 Stat. 7522 ..... 14, 16, 17
Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96–132, Section 21(a)(2), 93 Stat. 1049 3
Natural Gas Policy Act of 1978, Section 202(c), 15 U.S.C. (Supp. V) 3342(c) 13
Social Security Act, 42 U.S.C. (& Supp. IV) 301 *et seq.* 19, 20

Statutes (Cont'd): Page

Section 205(c)(1)(B), 42 U.S.C. (& Supp. IV) 405(c)(1)(B) 6
Section 205(c)(4), 42 U.S.C. 405(c)(4) .. 6
Section 210(a)(3)(A), 42 U.S.C. 410(a)(3)(A) 5
Section 211(a)(5)(A), 42 U.S.C. 411(a)(5)(A) 2, 3, 4, 5, 6, 7, 14, 19
2 U.S.C. (Supp. V) 288k(b) 4
28 U.S.C. (1925 ed.) 345 11
28 U.S.C. 1252 ..... passim
28 U.S.C. 1254(1) 14
28 U.S.C. 1291 ..... 7, 8, 9, 12, 20
28 U.S.C. 2101(a) 19
28 U.S.C. 2106 20

Miscellaneous:

81 Cong. Rec. (1937):
p. 3254 15
pp. 3254–3255 18
p. 3256 15
p. 3260 ..... 15, 16
p. 3261 ..... 15, 16
pp. 3268–3269 18
p. 3269 16
pp. 3269–3270 16
p. 3272 15
pp. 3272–3273 16
p. 3273 15
p. 8514 ..... 16, 17
126 Cong. Rec. H10562 (Nov. 12, 1980) 3
H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. (1937) 14
H.R. Rep. No. 212, 75th Cong., 1st Sess. (1937) 14

Miscellaneous (Cont'd): Page

S. Rep. No. 963, 75th Cong., 1st Sess. (1937) . 14, 15, 16, 17

Social Security Ruling No. 81–17c (Cum. Ed. 1981) 4

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 13, 14

17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (1978) 12

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No.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals dismissing the government's appeal (App. A, *infra*, 1a) is not reported. The May 22, 1981 order of the district court granting summary judgment to respondents as to liability and class certification (App. C, *infra*, 3a-4a), the January 22, 1982 opinion of the district court regarding relief (App. D, *infra*, 5a-12a), and the March 19, 1982 order of the district court amending the January 22, 1982 opinion (App. E, *infra*, 13a-15a) are not reported.

JURISDICTION

The order of the court of appeals dismissing the government's appeal was entered on July 27, 1982 (App. B,

infra, 2a). On October 19, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

1. Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. 411(a)(5)(A), provides that in computing self-employment earnings for purposes of social security coverage, if any income derived from a trade or business is community income under the community property laws of the state, all of the gross income and deductions shall be attributable to the husband unless his wife exercises substantially all of the management and control of the trade or business. In the latter event, all of the gross income and deductions are treated as those of the wife.

During 1980, several courts held that this provision unconstitutionally discriminates on the basis of gender by creating a presumption that husbands are to be credited with all community income from a trade or business. In each case, the court remanded to the Secretary for a determination of the wife's earnings without regard to the presumption in Section 211(a)(5)(A). *Hester* v. *Harris*, 631 F.2d 53, 55-56 (5th Cir. 1980); *Carrasco* v. *Secretary of HEW*, 628 F.2d 624, 627-631 (1st Cir. 1980); *Becker* v. *Harris*, 493 F. Supp. 991, 994-995, 997 (E.D. Cal. 1980). In connection with its remand order, the Fifth Circuit in *Hester* concluded that the Secretary should, in the first instance, develop new methods and standards governing a claimant's entitlement to benefits under the Act in the context of a small family business, noting that "there must be thousands and thousands" of such cases in community property states. 631 F.2d at 56-57. The First Circuit, in *Carrasco*, likewise suggested that the Secretary should formulate a "new plan" for crediting such community income. 628 F.2d at 631. See also *Becker* v. *Harris*, *supra*, 493 F. Supp. at 996.

By letters dated September 20, 1980, the Attorney General formally notified the Speaker of the House of Representatives and the President of the Senate that the Solicitor General had determined that the government would not appeal the district court's decision in *Becker* holding Section 211(a)(5)(A) unconstitutional and that the Attorney General had concluded that the gender-based classification in Section 211(a)(5)(A) could not be defended under the standards announced by this Court in *Califano* v. *Westcott*, 443 U.S. 76 (1979), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).[1] See 126

[1] Under Section 21(a)(2) of the Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1049, the Attorney General was required to transmit a report to each House of Congress in any case in

Cong. Rec. H 10562 (daily ed. Nov. 12, 1980). This action constituted a formal acquiescence by the Executive Branch in the view that Section 211(a)(5)(A) is unconstitutional.[2]

2. On October 20, 1980, respondent Edwards filed this action in the United States District Court for the Northern District of California challenging the constitutionality of Section 211(a)(5)(A). The government informed the district court that it would not defend the constitutionality of the statute and requested the court to remand Edwards' case to the Secretary to allow him to determine how self-employment income should be allocated in community property states, as the courts had done in *Becker*, *Hester* and *Carrasco* (App. D, *infra*, 6a n.2). By order dated May 22, 1981, the district court denied the motion to remand to the Secretary, granted Edwards' motion for summary judgment on the issue of liability, and certified a requested class of all applicants for and recipients of Old Age, Survivors, and Disability Insurance benefits in community property states who were affected by the operation of Section 211(a)(5)(A) (App. C, *infra*, 4a).

On January 22, 1982, the district court issued an opinion resolving various questions regarding relief (App. D, *infra*, 5a-12a). The district court rejected the Secretary's proposal to allocate self-employment income to class members in the same gender-neutral manner in which such income is allocated between spouses in non-

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which he determined that the Department of Justice would refrain from defending any provision of law because of the position of the Department of Justice that the provision was unconstitutional. See also 2 U.S.C. (Supp. V) 288k(b). *Becker* was the first case in which the Solicitor General had to decide whether a direct appeal would be taken from a decision holding Section 211(a)(5)(A) unconstitutional.

[2] The Social Security Administration subsequently published a ruling acquiescing in the decision in *Becker*. See Social Security Ruling No. 81-17c, at 40 (Cum. Ed. 1981).

community property states. The court explained that under the Department's interpretation of Section 211(a), self-employment income can be derived only from partnerships or sole proprietorships. Thus, in non-community property states, if a married claimant cannot establish that a trade or business was carried on in a partnership with the other spouse, a determination is made as to which spouse was the sole proprietor and all income is then allocated to that spouse's account (App. D, *infra*, 6a). The court found this approach "inappropriate" in community property states because of its view that the factual determination of which spouse was the sole proprietor would be more difficult. The court also asserted, without elaboration or citation to supporting evidence, that "[a] strong possibility exists that such a sex-neutral standard would result in practice in an unstated sexually discriminatory presumption" (*id.* at 6a-7a).

In addition, the district court stated that it was "not persuaded" by the Secretary's interpretation of Section 211(a) as limiting self-employment income to that derived from a partnership or sole proprietorship, explaining that in its view the language of Section 211(a) "does not preclude the possibility of a co-proprietorship, where the business does not meet the partnership requirements but nevertheless employed both spouses" (App. D, *infra*, 7a). The court concluded that such "co-proprietor income" should be allocated between the spouses' earnings accounts according to the relative amount of labor contributed by each (*ibid.*, citing *Rasmussen* v. *Gardner*, 374 F.2d 589, 594 (10th Cir. 1967)).[3]

[3] The Social Security Act does not recognize as covered employment an individual's work in a business in which his spouse is the sole proprietor, because of the potential for fraud or abuse in allocating income resulting from a family business. See 42 U.S.C. 410(a)(3)(A); *Carrasco* v. *Secretary of HEW*, *supra*,

The district court ordered that its new rule for the allocation of self-employment income between spouses in community property states be applied to class members retroactively to the inception of the coverage of self-employment in 1950 (App. D, *infra*, 7a-10a). In so ordering, the court rejected the government's contention that, under this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971),[4] the elimination of the presumption in Section 211(a)(5)(A) in favor of husbands should be applied only to income derived after October 1980, the date of the government's acquiescence in the decision in *Becker* (App. D, *infra*, 7a). In weighing the equities under *Chevron Oil*, the court recognized as a "serious problem" the possibility that retroactive reallocation of income could reduce some husbands' quarters of coverage so as to make them ineligible for benefits or reduce their income and that some wives might be better off with their share of their husbands' income than with their own. Rather than declining to order retroactive relief on this ground, however, the court ordered that no current recipient shall have his benefits reduced as a result of its decision and that wives who would benefit more from the former system could elect to remain under it (App. D, *infra*, 9a-10a). The court also held that its order of retroactive relief would not be limited by 42 U.S.C. (& Supp. IV) 405(c)(1)(B) and 405(c)(4), which generally restrict to three years, three months, and fifteen days the period within which in-

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628 F.2d at 629. Nevertheless, under the district court's order, an individual's work in a business fully managed and controlled by his spouse will be deemed self-employment of a "co-proprietor" in community property states.

[4] See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 37-38 (plurality opinion).

come entries in the Secretary's records may be corrected (App. D, *infra*, 10a-11a).[5]

3. The Secretary filed a notice of appeal to the court of appeals on March 31, 1982 (App. G, *infra*, 17a). In its Docketing Statement, filed on May 5, 1982, the government stated that it had conceded the unconstitutionality of Section 211(a)(5)(A) and that the remaining issues concerned solely the relief to be granted. In the itemization in the Docketing Statement of the issues to be raised on appeal, the government listed only matters concerning relief; there was no mention of the constitutional issue.[6]

On June 2, 1982, respondents filed a motion to dismiss the government's appeal, contending that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291. Respondents argued that the government had a right to take a direct appeal to this Court under 28 U.S.C. 1252, which provides for such an appeal from a judgment or order holding an Act of Congress unconstitutional in a civil action to which the United States or an agency or officer thereof is a party, even though the government sought review only of the district court's decision on non-constitutional issues. Accordingly, respondents maintained that the court of appeals did not have jurisdiction of the case under 28

[5] The court's January 22, 1982, opinion, as modified by an order of March 19, 1982, requires that notice of the decision be sent to all female class members residing in community property jurisdictions who were denied benefits after August 20, 1980 (App. D, *infra*, 11a; App. E, *infra*, 14a). Respondent Edwards' individual case was remanded to the Secretary for further proceedings under the standards announced in the court's decision (*id.* at 13a). Final judgment was entered against the Secretary on March 23, 1982 (App. F, *infra*, 16a).

[6] The Docketing Statement is attached as Exhibit G to the Brief in Support of Plaintiffs-Appellees' Motion to Dismiss the Appeal for Lack of Jurisdiction, No. 82-4156, filed in the court of appeals.

U.S.C. 1291, which does not apply "where direct review may be had in the Supreme Court." See *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389, 391 (1982).[7]

By order dated July 27, 1982, the court of appeals granted respondents' motion to dismiss the appeal for lack of jurisdiction, citing only 28 U.S.C. 1252 and *Donovan* v. *Richland County Association for Retarded Citizens*, *supra* (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question concerning the scope of this Court's appellate jurisdiction under 28 U.S.C. 1252. The court below concluded that an appeal in a case in which a federal district court has held an Act of Congress unconstitutional must be taken directly to this Court under Section 1252 rather than to the court of appeals under 28 U.S.C. 1291, even though the appellant does not seek review of the district court's constitutional holding. This decision is inconsistent with the text of Section 1252, which in its second paragraph plainly contemplates that an appeal raising only non-constitutional issues may be taken to the court of appeals.

The decision below also disregards the legislative history of Section 1252 and the decisions of this Court construing that section, which make clear that the direct appeal procedure was intended to provide for an expeditious and authoritative resolution only of disputed questions of the constitutionality of an Act of Congress. This purpose has no application here, where the unconstitutionality of the statutory provision is conceded and will not be in issue on appeal. The effect of the court of appeals' decision is to expand the scope of this Court's mandatory appellate jurisdiction by shift-

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[7] See Brief, *supra* note 6, at 4-5, 7-8.

ing to this Court a category of appeals raising nonconstitutional issues that would more appropriately be heard in the first instance by the courts of appeals. Such a decision by a court of appeals concerning the appellate jurisdiction of this Court especially warrants review by this Court.

Review also is warranted because the court of appeals' order dismissing the Secretary's appeal leaves standing and unreviewable the decision of the district court on relief, which will bind the Secretary in all community property jurisdictions. That decision is erroneous in a number of critical respects; it conflicts with decisions of the First and Fifth Circuits on questions of relief in this precise setting; and it will have significantly adverse practical consequences in the administration of the Social Security program.

1. The first paragraph of 28 U.S.C. 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, * * * is a party." Under the concluding phrase of 28 U.S.C. 1291, a court of appeals does not have jurisdiction of an appeal from a final decision of a district court under that Section "where direct review may be had in the Supreme Court." *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, 454 U.S. at 391. In this case, the court of appeals held that it did not have jurisdiction of the government's appeal under 28 U.S.C. 1291 because direct review could have been had in the Supreme Court under 28 U.S.C. 1252. This conclusion is inconsistent with the language, legislative history, and purposes of Section 1252.

a. The text of the first paragraph of Section 1252, just quoted, itself indicates that the existence of a con-

stitutional issue on appeal is a necessary prerequisite for a direct appeal to this Court. Direct appeal lies "from" a judgment or order holding an Act of Congress unconstitutional, thereby directly linking the right of appeal to the holding of unconstitutionality. In the instant case, in contrast, the government will not challenge the district court's holding of unconstitutionality, and that holding will remain in effect even if the government prevails on its appeal. Nothing on the face of the first paragraph of 28 U.S.C. 1252 suggests that Congress intended to bring such an appeal under a procedure that was manifestly intended for resolution of constitutional issues.

In addition, because a direct appeal lies under Section 1252 whether the order appealed from is "interlocutory or final," a direct appeal may be taken to this Court from an order declaring a statute unconstitutional that was issued before the district court had an opportunity to consider questions of relief. If the Court were to affirm an interlocutory order holding an Act of Congress unconstitutional and remand to the district court for further proceedings only on questions of relief, it could not seriously be contended that any subsequent appeal from the district court's order granting relief must again be taken directly to this Court under 28 U.S.C. 1252. The relevant "holding" on the constitutional issue would have been the decision of this Court on the prior appeal, not any subsequent reiteration by the district court of that holding. Thus, it seems plain from the text of the first paragraph of Section 1252 that Congress did not intend that questions of relief must be reviewed in the first instance by this Court in every case in which an Act of Congress has been held unconstitutional, even where the constitutional holding itself is no longer in issue. The result should be no different

in the instant case, where the district court's constitutional holding likewise is not in issue on appeal.[8]

b. If there were any remaining doubt on the question, the second paragraph of 28 U.S.C. 1252 makes clear that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court. The second paragraph of Section 1252 provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

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[8] This construction of the first paragraph of 28 U.S.C. 1252 is supported by reference to the prior provision for direct appeal from a district court to the Supreme Court. In the Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 *et seq.*, Congress created the circuit courts of appeals (Section 2, 26 Stat. 826) and conferred on them jurisdiction to review final decisions of the district courts (Section 6, 26 Stat. 828), except where direct review was available in this Court under Section 5 (26 Stat. 827). The latter Section provided for direct appeals to this Court from the district courts, inter alia:

> In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States * * * is drawn into question.

Thus, Section 5 appears rather clearly to have provided for direct review by this Court only where the constitutional issue actually would be addressed on appeal. This provision was reenacted in the Judicial Code of 1911, Act of Mar. 3, 1911, ch. 231, Section 238, 36 Stat. 1157, and remained in effect until 1925 (see 28 U.S.C. (1925 ed.) 345), when it was eliminated by a statute narrowing this Court's mandatory jurisdiction. Act of Feb. 13, 1925, ch. 229, Section 238, 43 Stat. 938. There is no indication that Congress intended to confer a broader right of direct appeal, to embrace appeals on non-constitutional issues as well, when it restored the direct appeal mechanism in 1937 for cases involving the constitutionality of federal statutes.

The first sentence of this paragraph establishes that all appeals or cross appeals in a case in which an Act of Congress has been held unconstitutional must be taken to this Court only *after* a party has filed a notice of appeal pursuant to the first paragraph of Section 1252. The necessary corollary to this rule is that prior to or in the absence of such notice, other appeals may be taken to the court of appeals.

Moreover, the second sentence just quoted provides that all appeals taken to "other courts" prior to the filing of the notice of appeal to this Court pursuant to the first paragraph of Section 1252 "shall be treated as taken directly to the Supreme Court"; such appeals to other courts are not regarded as jurisdictionally defective because they were not taken directly to this Court in the first instance. It necessarily follows that if a notice of appeal to this Court pursuant to the first paragraph of Section 1252 is not filed, appeals taken to "other courts"—in this case, to the court of appeals—likewise are not jurisdictionally defective. Cf. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4037, at 53 (1978).

Thus, the first and second paragraphs of 28 U.S.C. 1252 together divide appeals in cases in which a district court has held an Act of Congress unconstitutional into two categories: those that must be taken directly to this Court, and those for which the generally applicable right of appeal to the court of appeals pursuant to 28 U.S.C. 1291 is preserved. It is evident from the text and structure of 28 U.S.C. 1252 that the basis for distinguishing between the two categories must be whether the appeal itself presents the question of the constitutionality of an Act of Congress to which the first paragraph explicitly refers.[9]

[9] This Court's jurisdiction under 28 U.S.C. 1252 therefore does not depend on whether the constitutional question was contested in the court that held the Act of Congress unconstitu-

When a direct appeal is taken to this Court, the Court of course has jurisdiction to decide "not only the constitutional question, but the whole case" (*Williams* v. *Zbaraz*, 448 U.S. 358, 368 n.10 (1980), quoting *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975)), including non-constitutional questions such as those concerning the relief to be granted if the holding of unconstitutionality is affirmed.[10] But where the appellant does not seek review of the holding of unconstitutionality, an appeal does not lie under 28 U.S.C. 1252 on any issue.[11] An appeal from other aspects of the district

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tional, but rather on whether this Court is asked to review the constitutional holding. See Reply Brief for the Appellant in response to the Motions to Dismiss in *INS* v. *Chadha*, No. 80-1832 (1980 Term), at 3-10. Such cases of course include those in which the appellant challenges the district court's interpretation of the Act of Congress that in turn led the court to hold the Act unconstitutional. See, *e.g.*, *Donovan* v. *Blitz*, appeal pending, No. 82-611. In such a case, if this Court adopts the appellant's statutory construction, it will reverse the holding of unconstitutionality.

[10] The provision in the second paragraph of Section 1252 for all other appeals and cross-appeals to be taken directly to this Court also ensures that there will not be duplicative proceedings in the court of appeals and this Court on these nonconstitutional questions. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

[11] For this reason, the United States has moved to dismiss the appeals in *Process Gas Consumers Group* v. *Consumer Energy Council of America*, No. 81-2008, and *Petrochemical Energy Group* v. *Consumer Energy Council of America*, No. 81-2151. Those appeals seek review of certain aspects of the District of Columbia Circuit's decision in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (1982), appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151 81-2171, 82-177 and 82-209, in which the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. V) 3342(c). The appeals in Nos. 81-2008 and 81-2151 do not seek review of the court of appeals' holding that the legislative veto

court's decision therefore must be taken to the court of appeals unless another party has taken a direct appeal to this Court on the constitutional question. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

c. The legislative history of 28 U.S.C. 1252 strongly supports the conclusion that the direct appeal mechanism is available only when the constitutional holding will be subject to review and reversal on appeal. The direct appeal provision in 28 U.S.C. 1252 was first enacted as Section 2 of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 752. The House, Senate and Conference Reports on that measure all described the bill as one providing, in pertinent part, for "appeal by the United States in certain cases in which the constitutionality of acts of Congress is involved" (H.R. Rep. No. 212, 75th Cong., 1st Sess. 1 (1937); S. Rep. No. 963, 75th Cong., 1st Sess. 1 (1937); H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. 5 (1937)). In addition, the House Report explained that the purpose of the provision was to ensure a "prompt determination by the court of last resort of *disputed questions of the constitutionality of acts of the Congress*" (H.R. Rep. No. 212 *supra*, at 2;

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provision is unconstitutional, and they therefore cannot be brought pursuant to the first paragraph of 28 U.S.C. 1252. Moreover, because the decision was rendered by a court of appeals, not a district court, the appellants in those cases have no other right to take an appeal on the non-constitutional questions that can be transferred to this Court pursuant to the second paragraph of Section 1252. Review of the other questions presented therefore may be obtained only pursuant to this Court's discretionary certiorari jurisdiction under 28 U.S.C. 1254(1). See Memorandum for the United States in *Process Gas Consumers Group, et al.* v. *Consumer Energy Council of America, et al.*, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209 (filed Sep. 9, 1982), at 20-21 & n.8. See also the United States' Motion to Dismiss the cross-appeal in *Beneficial Finance of Kansas, Inc.* v. *United States*, cross-appeal pending, No. 81-583 (filed Nov. 25, 1981), at 5-6.

emphasis added). The government's appeal in the instant case "involve[s]" no such "disputed question[]" of the constitutionality of Section 211(a)(5)(A) of the Social Security Act; the government has conceded the unconstitutionality of that provision and seeks review only of other issues. The Senate Report similarly refers to the power of the Attorney General "to take a question of constitutionality to the Supreme Court" (S. Rep. No. 963, *supra*, at 2).

The floor debates also demonstrate that the direct appeal mechanism was intended for resolution of the constitutional question. Thus, Representative Sumners, Chairman of the House Judiciary Committee and sponsor of the bill, explained that the Attorney General should be granted "the right to appeal directly to the Supreme Court from an adverse decision *on the question of constitutionality*" (81 Cong. Rec. 3254 (1937); emphasis added) "in order to expedite the determination of the constitutional question" (*id.* at 3272).[12] This, he explained, would "shut[] off a long period of suspense for the litigants in other cases" if the "determination is against the constitutionality of the act" (*id.* at 3256). Similarly, Representative Chandler explained that passage of the measure was necessary because, although Congress had passed numerous laws, it had "not expedited the determination of their constitutionality when the lowest courts declare them invalid" (*id.* at 3273).

Representative Sumners was asked whether, when the Attorney General intervened in a suit between pri-

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[12] See also 81 Cong. Rec. 3261 (1937) (remarks of Rep. Sumners; emphasis added):

> When the question of the constitutionality of an act of Congress is raised, and it is a serious question, it is the judgment of the members of the committee that *that question* ought to be presented to the Supreme Court just as quickly as it can be carried there properly.

vate parties involving the constitutionality of an Act of Congress and took an appeal directly to the Supreme Court following the district court's holding of unconstitutionality, "this take the entire case directly to the Supreme Court * * * or just the question of constitutionality?" 81 Cong. Rec. 3260 (1937) (remarks of Rep. McFarlane). Representative Sumners did not respond directly to this question, although this Court of course has since held that a direct appeal brings up the "whole case." See, *e.g.*, *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 368. But Representative Sumners did stress in his answer that the case "would come up on the question of constitutionality." 81 Cong. Rec. 3260 (1937).

Another Member inquired further regarding the other issues that could be involved in the case (*id.* at 3261 (remarks of Rep. Dowell)):

> Assuming that litigants have other questions involved and that on the other question an appeal is taken from the district court. Assume further the Attorney General intervenes on a constitutional question. How would the litigant proceed in the court of appeals so far as their appeal is concerned?

The Committee's recommended bill did not contain a provision similar to that now embodied in the second paragraph of 28 U.S.C. 1252, providing for a transfer of such appeals to this Court (see 81 Cong. Rec. 3269 (1937)), and Representative Sumners therefore responded that he did not know what arrangement would be made for cases in which separate appeals were taken to the court of appeals and the Supreme Court (*id.* at 3261). The bill passed by the Senate responded to this concern by adopting a provision for other appeals in the case to be taken to this Court as well, but only if a direct appeal has first been taken to this Court under what is now the first paragraph of Section 1252. See S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937). Section 2 of the law as enacted contained this provision.

50 Stat. 752.[13] Thus, where, as here, a direct appeal has not been taken to this Court from the district court's holding of unconstitutionality, the right of appeal to the court of appeals on other issues was preserved.

The legislative history therefore leaves no doubt that Congress enacted what is now 28 U.S.C. 1252 for the purpose of making a direct appeal available in those situations in which the question of the constitutionality of an Act of Congress would actually be presented to this Court, and that Congress understood that appeals raising other issues would continue to be taken to the court of appeals. There is no indication that Congress intended to permit a direct appeal where the appellant seeks review only of non-constitutional issues and where the decision on appeal therefore would not affect the district court's holding of unconstitutionality.

d. The opinions of this Court construing 28 U.S.C. 1252 offer no support for the decision of the court of appeals in this case. Those opinions make clear that the purpose of Section 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a

[13] The House bill provided for direct appeal only by the Attorney General, not other parties to the case. 81 Cong. Rec. 3269-3270, 3272-3273 (1937). It was thus clear that under the House bill, appeals by other parties on non-constitutional questions (as well as the constitutional issue) would have been taken to the court of appeals. The Senate bill, and the law as enacted, made the right of direct appeal available to any party, not merely the United States, yet at the same time inserted the provision now contained in the second paragraph of 28 U.S.C. 1252, which expressly contemplates that certain appeals may continue to be taken to the court of appeals. S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937); 50 Stat. 752. Nothing in the language or legislative history suggests that the preservation of a right of appeal to the court of appeals in certain situations does not apply to the government as well as other parties.

holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975); see also *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, 454 U.S. at 390–391 n.3. Because, in these circumstances, the Executive will be required to adhere to the holding of unconstitutionality and to disregard the contrary provisions of a duly enacted law, Congress determined that a due regard for the role of the Legislative Branch and the need to remove a cloud from the administration of the statute in question warranted a prompt and definitive resolution by the only Court capable of providing it. *McLucas* v. *DeChamplain*, *supra*; *Fleming* v. *Rhodes*, 331 U.S. 100, 104 & n.6 (1947); *Reid* v. *Covert*, 351 U.S. 487, 490 (1956), vacated on other grounds, 354 U.S. 1 (1957); 81 Cong. Rec. 3254-3255, 3268-3269 (1937) (remarks of Rep. Sumners).

These policies simply have no application where, as here, the Attorney General has acquiesced in the district court's constitutional holding because the unconstitutionality of the statutory provision is, in his view, dictated by prior decisions of this Court. The decision not to appeal the holding of unconstitutionality in such a case necessarily carries with it a determination by the Executive to adhere to the lower court's holding in the nationwide administration of the law. To require the government nevertheless to take an appeal directly to this Court only on questions of relief therefore would not serve the purposes underlying Section 1252, because the holding of unconstitutionality would not be affected by the outcome of the appeal. And, at the same time, such a requirement would add a new category of cases to this Court's mandatory appellate docket at a time when the burden on this Court is increasing in other respects. The decision of a court of appeals that bears so directly on this Court's jurisdiction should be reviewed by this Court.

The only authority the court of appeals cited in its order dismissing the appeal was this Court's decision last Term in *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*. See App. A, *infra*, 1a. But that decision obviously has no application here. There, the Secretary of Labor did challenge the district court's holding of unconstitutionality, and the Secretary's appeal therefore had to be taken to this Court. Nothing in *Richland County* suggests that an appeal that does not present the constitutional question must be brought directly to this Court as well. This Court should correct the court of appeals' obvious misapprehension of the ruling in *Richland County*.

2. Review also is warranted in this case because the effect of the court of appeals' dismissal of the appeal is to leave standing and unreviewable by any court an erroneous district court decision on relief that will bind the Secretary in the administration of the Social Security Act in all community property jurisdictions.[14] The district court's decision ordering the Secretary to recognize a judicially fashioned concept of a "co-proprietorship" that has no basis in the Act itself (see page 5, and note 3, *supra*) directly conflicts with the decision of the Fifth Circuit in *Hester* v. *Harris*, *supra*, 631 F.2d at 56, which expressly declined to order that approach after holding Section 211(a)(5)(A) unconstitutional. The refusal by the district court to remand the case to the Secretary to allow him, in the first instance, to formulate a plan for the allocation of income between spouses in community property jurisdictions also squarely conflicts with the decisions of the First and Fifth Circuits in *Carrasco* v. *Secretary of HEW*, *supra*, and *Hester*

[14] Respondents did not move to dismiss the Secretary's appeal to the court of appeals until June 2, 1982, three days after the Secretary's time in which to file a jurisdictional statement docketing the appeal in this Court had expired. See 28 U.S.C. 2101(a).

v. *Harris*, *supra*, and with that of the district court in *Becker* v. *Harris*, *supra*. Such judicial usurpation of the Secretary's responsibility for administering the Social Security Act should not be permitted to go unreviewed.

In addition, the district court's order requiring that records be corrected for members of the class retroactive to the beginning of the self-employment program in 1950, if necessary, will impose substantial burdens on the Social Security program. And the court's order that no husband's benefits may be reduced even if his wife or former wife is paid benefits calculated on the basis of earnings that are reallocated from the husband's account will result in the unauthorized payment of duplicative benefits and an unwarranted drain on the Social Security Trust Fund. An opportunity for at least one level of appellate review should be afforded for a decision having these adverse consequences.[15]

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[15] If the Court concludes that an appeal should have been taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, it is respectfully submitted that the appropriate disposition would be for the Court to grant the petition, vacate the judgment below, and remand to the district court with instructions to enter a new judgment from which a direct appeal to this Court could be taken. See *Query* v. *United States*, 316 U.S. 486, 490-491 (1942); see also *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972); *Phillips* v. *United States*, 312 U.S. 246, 254 (1941); 28 U.S.C. 2106. In *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, the Court declined to order this relief because the government was challenging a holding striking down the statute in question but had failed to follow the "clear commands" of 28 U.S.C. 1252 that such an appeal be taken directly to this Court. Here, in contrast, it surely cannot be said that there is a "clear command" in 28 U.S.C. 1252 that the government take a direct appeal solely on a question of relief. *Phillips* v. *United States*, *supra*, 312 U.S. at 254. Moreover, while *Richland County* involved the ap-

3. Although the jurisdictional question presented is important and warrants review by this Court, we do not believe that plenary consideration is necessary to correct the manifest error of the court of appeals. We therefore have set forth the argument on the jurisdictional issue in detail at this stage in the event that the Court should agree that summary disposition is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Respectfully submitted.

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NOVEMBER 1982

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plication of an Act of Congress in only one factual situation, the decision of the district court in this case will bind the Secretary in the application of the Social Security Act to numerous claimants in all community property jurisdictions.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82–4156

DC# CV 80–3959 MHP
Northern California

Filed July 27, 1982

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

ORDER

Before: TANG and FERGUSON, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted. *See* 28 U.S.C. § 1252, *Donovan v. Richland County Association*, 102 S.Ct. 713 (1982).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82–4156

DC CV 80–3959 MHP

Filed August 19, 1982

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DEFENDANT-APPELLANT.

APPEAL from the United States District Court for the Northern District of California.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal is dismissed for lack of jurisdiction.

Filed and entered July 27, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

Civil Action No. C–80–3959 MHP

Filed May 22, 1981

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF,

vs.

RICHARD SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DEFENDANT

ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AS TO LIABILITY AND CLASS CERTIFICATION AND DENYING DEFENDANT'S MOTION FOR REMAND

This matter having come on for consideration of Defendant's Motion for Remand of the individual plaintiff's case and for consideration of Plaintiff's Motions for Summary Judgment on the issue of defendant's liability and for Certification of a Plaintiff Class, and the Court, after the submission of briefs on the above motions and after hearing oral argument on the same, being fully advised in the premises, it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Defendant's Motion for Remand of the individual Plaintiff's case is denied;

2. Plaintiff's Motion for Summary Judgment on the issue of Defendant's liability is granted;

3. This Court having found that Plaintiffs have met the requirements of Federal Rules of Civil Procedure 23(a) and b(2), Plaintiff's Motion for Certification of the following class is granted:

All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C. § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411(a)(5)(A).

4. Counsel for Plaintiffs and Defendants are hereby instructed to work to resolve the issue of the time limits to be placed upon membership in the Plaintiff class and the issue of the methods of notice to class members. Counsel are to report their progress at a status conference to be held by this Court on July 13, 1981 at 9:30 A.M.

DATED: MAY 22 1981

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C–80–3959

MILDRED M. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

MEMORANDUM DECISION AND ORDER

Filed Jan. 22, 1982

Plaintiffs challenged the constitutionality of 42 U.S.C. § 411(a)(5)(A),[1] which governs the treatment of self-employment income in community property states. A class was certified of

> All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C. § 401 et seq., on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411(a)(5)(A).

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[1] Hereinafter all references to section numbers are from 42 U.S.C.

The class was further limited to members who received a final decision from the Secretary of Health and Human Services within 60 days of the filing of the action.

Section 411(a)(5)(A) was found to violate the due process clause of the fifth amendment because it unlawfully discriminated against women on the basis of sex.[2] The issue now before the court is what relief is to be afforded class members who were adversely affected by the operation of the statute.

SCOPE OF RELIEF

Defendant proposes to treat plaintiff class members as the agency now treats non-community property claimants.[3] Under agency interpretation of § 411(a), self-employment income can be derived only from partnerships or sole proprietorships. If claimants cannot meet the partnership criteria, a determination is made as to which spouse is the sole proprietor. All income is then allocated to that spouse's account. Defendant argues that this is a sex-neutral standard.

The court finds this solution inappropriate. First, community property claimants differ significantly from

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[2] Defendant essentially conceded the unconstitutionality of § 411(a)(5)(A), due to earlier court decisions. *Hester* v. *Harris*, 631 F.2d 53 (5th Cir. 1980); *Carrasco* v. *Secretary of Health, Education and Welfare*, 628 F.2d 624 (1st Cir. 1980); *Becker* v. *Harris*, 493 F.Supp. 991 (E.D. Cal. 1980). Despite those decisions, the agency had continued to apply the challenged section. This court therefore rejected a request by defendant that the case be remanded for consideration, finding that the case-by-case challenge, agency acquiescence, and remand was inappropriate for disposing of these cases. Therefore, plaintiff's motion for class certification was granted.

[3] Defendant has argued that plaintiffs do not have standing to attack the application of the remainder of § 411(a), since it has never been applied to them. This argument has no merit. Standing concerns whether the court has initial jurisdiction to hear a suit. It does not pertain to the later stage of relief.

other claimants in that each spouse owns fifty percent of the business property. This is likely to make the factual determination of who was sole proprietor much more difficult. A strong possibility exists that such a sex-neutral standard would result in practice in an unstated sexually discriminatory presumption. Second, the court is not persuaded by the agency interpretation of the statute. Section 411(a) discusses partnerships and individuals, not sole proprietorships. This does not preclude the possibility of co-proprietorship, where the business does not meet the partnership requirements but nevertheless employed both spouses. *Rasmussen* v. *Gardner*, 374 F.2d 589, 594 (10th Cir. 1967).

Plaintiffs are entitled to an allocation of such co-proprietor income between the spouses' earnings accounts. Such a resolution was suggested in *Hester* v. *Harris*, 631 F.2d 53, 56 (5th Cir. 1980). The basis for the division should be the relative amount of labor contributed by each. *See Rasmussen* v. *Gardner*, 374 F.2d at 594.

RETROACTIVITY

Defendant proposes that elimination of the presumption in favor of husbands under § 411(a)(5)(A) be applied only to income derived after October 1980. This is when the decision to acquiesce in *Becker* v. *Harris*, 493 F.Supp. 991 (E.D. Cal. 1980), became final. Plaintiffs object, arguing that such a limit essentially nullifies any relief.

Retroactive application of a judicial decision is the norm. "The concept stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been." *Cash* v. *Califano*, 621 F.2d 626, 628 (4th Cir. 1980). Nevertheless, in recognition that retroactivity sometimes causes inequities, the Supreme Court developed a test for determining when prospec-

tive-only application is appropriate. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). "However, *Huson* considers the retroactive effect of a separate decision, rather than the scope of relief to be afforded in the case before a court." *Shannon* v. *United States Civil Service Commission*, 444 F.Supp. 354, 369 (N.D. Cal. 1977), *modified on other grounds*, 621 F.2d 1030 (9th Cir. 1980). Like *Shannon*, this case involves the relief to be afforded the plaintiff class herein, since this court decided liability. Therefore, the *Huson* factors need not be applied in determining that relief should be retroactive beyond the October 1980 date.

Even if the *Huson* test is used, retroactivity is still appropriate. *Huson* provides a three-part test. First, the decision which is to be applied prospectively must establish a new principle of law, not "clearly foreshadowed" by earlier precedent. Second, prospective application must further the purpose of the rule. Third, the equities must weigh against retroactivity. *Chevron Oil* v. *Huson*, 404 U.S. at 106-07. All three prongs of the test must be satisfied for prospective only application, and the party arguing against retroactivity bears the burden of persuasion. *See Cash* v. *Califano*, 621 F.2d at 629.

The first factor weighs in favor of retroactivity. There was a substantial likelihood that § 411(a)(5)(A) would be struck down on gender discrimination grounds. Given the strong line of gender discrimination cases decided by the Supreme Court in the last decade,

> the most the Secretary could have hoped for was a halt in a very clear trend. None of the nonretroactivity cases have turned on so tenuous a proposition. Instead those cases have either involved a complete reversal of prior law, [citation omitted], or a pronouncement upon a case of first impression [citation omitted].

Cash v. *Califano*, 621 F.2d at 630. This case fits neither of those categories.

The second factor to be considered is whether prospective application would further the purpose of the rule. The Ninth Circuit has read § 411(a) to favor coverage. "The premise of the system ... is that all gainfully employed persons are to be covered, except as specifically excluded." *Delno* v. *Celebrezze*, 347 F.2d 158, 162 (9th Cir. 1965) (footnote omitted). The purpose of broad coverage favors retroactivity.

The third factor is a weighing of the equities.[4] Defendant argues that several hardships weigh against retroactivity: administrative burden, increased claims on the fund, and adverse effects on individual claimants. Administrative burden cannot rise to the level of "substantial inequitable results," *Chevron Oil* v. *Huson*, 404 U.S. at 107. If it did, it could be raised in almost every case where a statute is found unconstitutional. The depletion-of-the-fund argument has not been supported by any evidence. Mere assertions are insufficient. *See Hurvich* v. *Califano*, 457 F.Supp. 760, 764 (N.D. Cal. 1978).

The most serious problem in weighing the equities is possible adverse effects on individuals. Defendant argues that reallocation of income may reduce some males' quarters of coverage so as to make them ineligible or reduce their benefits. Defendant also conjectures that some women may be better off with their share of their husbands' accounts than with their own. These difficulties can be avoided, however. This court has the power to fashion a remedy that would "minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979). This court finds it appropriate to order that, despite any recompu-

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[4] Even if the equities weighed in favor of prospective application, retroactivity would still be required since the first two prongs of the *Huson* test have not been met. *See Cash* v. *Califano*, 621 F.2d 626, 629 (4th Cir. 1980).

tation, no current recipient shall have his benefits reduced. Also, the agency is to allow women who would benefit more from the former system to elect to remain under the original allocation.

Application of the *Huson* test to this case demonstrates that retroactive application of the decision in this case is proper. Therefore, plaintiff class members are entitled to a recomputation of their earnings records, extending back to the beginning of Social Security if necessary. There is no justification for cutting off retroactivity at any prior point.[5]

STATUTORY TIME LIMITATIONS

The Secretary contends that plaintiffs are bound by § 405(c)(4) and (5) time limitations on changing entries in employment records. Section 405(c)(4) sets a time limit of three years, three months, and fifteen days within which income entries may be corrected. After that time, the records become conclusive evidence of the account or existence of self-employment income, § 405(c)(4)(C), unless one of the specific exceptions in § 405(c)(5) is met.

The Secretary cannot use the statutory time limitations to preclude recomputations where the statute has been found unconstitutional. This court has the authority to provide plaintiffs with effective relief.

In addition, plaintiff class members fall into one of the exemptions from the limit, § 405(c)(5)(G).[6] That

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[5] This court is aware that retroactivity in a sex discrimination case has been limited to the date of decision in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), as "the case in which the new principle of law was first enunciated." *Cash* v. *Califano*, 469 F.Supp. 129, 135 (W.D. Va. 1979), *aff'd*, 621 F.2d 626 (4th Cir. 1980). This court finds such limitation inappropriate. The announcement of a new principle of law is relevant to whether retroactivity is appropriate, not to the period of retroactivity.

[6] It has been suggested that § 405(c)(5)(G) applies only when the entire earned amount is being shifted to another account.

section allows the Secretary "to correct errors made in the allocation ... [of] self-employment income." Therefore, the agency is not to restrict class members' requests for reallocation to the three year, three month, and fifteen day period.[7]

AMENDMENT OF REGULATIONS

Plaintiffs have requested that defendant be ordered to adopt regulations that conform with this court's ruling. Plaintiffs also request that any proposed regulatory amendments be subject to review by this court prior to publication. Such an order would be inappropriate. It is expected, of course, that any regulations adopted by the agency will be consistent with the several holdings of this court and other courts that have found § 411(a)(5)(A) unconstitutional. Plaintiffs retain the right to challenge any rule-making by following normal procedures.

NOTICE TO CLASS MEMBERS

The defendant is ordered to send individual notices of rights under this decision to female class members residing in community property jurisdictions who were denied benefits between August 20, 1980 and April 14, 1981. Defendant estimates that such notice will cost approximately $70,629.00.[8] This court finds that this is not an unreasonable amount, given the importance of the rights involved. Also, defendant was given the op-

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There is no basis for such a narrow reading of the statute. At least one court has applied that exception to a division of earnings between co-proprietors. *See Bocian* v. *Matthews*, 411 F. Supp. 1200 (N.D. Iowa 1976).

[7] It should be emphasized that even if the earnings are reallocated, this is not to adversely affect the benefits of any current recipient.

[8] A slightly higher figure was suggested by defendants at the hearing but that amount did not exceed $90,000.

portunity to correct its application of § 411(a) after the decision in *Carrasco* v. *Secretary of Health, Education and Welfare*, 628 F.2d 624 (1st Cir. June 11, 1980), and failed to do so. Plaintiffs are to submit a proposed notice that conforms with this and the preceding order of December 17, 1981. Defendant will then have twenty days in which to file objections.

CONCLUSION

Plaintiff class members are entitled to recomputation of their earnings records through an allocation of coproprietor income. Each spouse's earnings record should be credited with income proportionate to their labor in the business. The recomputation should extend to any relevant income without time limitations. Notice to class members is to be provided as outlined above.

IT IS SO ORDERED.

January 22, 1982.

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-80-3959 MHP

MILDRED M. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

Filed March 19, 1982

On January 22, 1982 this court issued a Memorandum Decision and Order which disposed of the substantive issues in this case. During a telephone conference with all parties on March 10, 1982 it became apparent that some procedural issues had to be resolved before an appealable final order could issue. The procedural problems are the status of Ms. Edwards' individual case, the extent of the class, the proper recipients of individual notices, and the contents of said notices.

First, Ms. Edwards' case is remanded to the Secretary for further proceedings consistent with the decisions of this court. Such proceedings should include a recomputation of her earnings records through an allocation of the income from the co-proprietorship (if the Secretary determines that a co-proprietorship existed), the allocation to be based on the relative labor contributions to the business of claimant and her spouse.

Second, there is some confusion concerning the extent of the class. On May 18, 1981 the court defined the class without reference to time limitations. On August

14, 1981 the class definition was modified for purposes of relief to include "those members who received a 'final decision' from the Secretary within 60 days prior to the filing of this lawsuit." That 60-day limitation was designed to preclude persons who might seek reopening of their case after the statutory period in 42 U.S.C. § 405(g) had run. The August 14 order was intended only to clarify the beginning point of the class for relief purposes. The class includes all persons who received a final decision from the Secretary within 60 days prior to the filing of this lawsuit, or at any time thereafter.

Third, the order of January 22, 1982 must be amended insofar as it describes those class members who are to receive individual notices. That order required that notice be sent to those class members "who were denied benefits between August 20, 1980 and April 14, 1981." The closing date of April 14 was chosen on the presumption that the Social Security Administration had ceased to enforce 42 U.S.C. § 411(a)(5)(A) as of that date. However, it has become apparent that § 411(a)(5)(A) continued to have some effect. Defendant did not retroactively recompute earnings records established while § 411(a)(5)(A) was in effect. Defendant also applied § 411(a) to co-proprietorships in community property states, which this court has found inappropriate. Therefore, any denial or reduction of benefits which is caused by the application of standards relative to §§ 411(a) or 411(a)(5)(A) not in accord with those standards contained in the January 22 order of this court are deemed to be decisions under § 411(a)(5)(A). Defendant is required to send an individual notice of rights under the decisions of this court to any class member so denied after April 14, 1981. This is in addition to the notices required by the January 22 order. Defendant is also required, as of the date of this order, to maintain a record of women in community property

states whose benefits are reduced or denied by virtue of the effect of § 411(a)(5)(A).

Finally, this court will issue shortly an order containing the language approved for the individual notices required by this order and that of January 22.

IT IS SO ORDERED.

Date: 19 March 1982.

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

vs.

RICHARD SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

NO. C-80-3959 MHP

FILED MARCH 23, 1982

JUDGMENT

Fed. R. Civ. P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge, presiding, and the issues having been duly presented and orders having been duly filed herein,

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is granted and plaintiff Edwards' claim is remanded to the defendant Secretary for proceedings consistent with this court's orders.

Dated: 23 March 1982.

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

CIVIL ACTION NO. C-80-3959 MHP

FILED MARCH 31, 1982

NOTICE OF APPEAL

NOTICE is hereby given that the defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on March 23, 1982.

Respectfully submitted,

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Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

By:/s/ JUDITH A. WHETSTINE
Assistant United States Attorney

/s/ LEWIS K. WISE

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